STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of SLS, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

LDS,

Respondent-Appellant,

and

LRS,

Respondent.

UNPUBLISHED
May 25, 2010

No. 294286
Macomb Circuit Court
Family Division
LC No. 2008-000236-NA

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

GLEICHER, J. (*dissenting*).

Because I cannot meaningfully distinguish this case from *In re HRC*, 286 Mich App 444; ___ NW2d ___ (2009), I respectfully dissent.

I. UNDERLYING FACTS AND PROCEEDINGS

Petitioner first took temporary custody of SLS in February 2007, on the basis of an allegation that respondent gave the 13-year-old child a knife and instructed her to stab respondent. Respondent admitted to having serious psychiatric and substance abuse problems, and the circuit court in May 2007 exercised jurisdiction over SLS. Also in May 2007, respondent signed a parent-agency agreement (PAA). In March 2008, the circuit court found that respondent had complied with the terms of her PAA, returned SLS to respondent's care, and terminated its jurisdiction over SLS. Less than two months later, respondent entered a psychiatric hospital after voicing "suicidal and homicidal threats." In April 2008, petitioner filed another petition seeking temporary custody of SLS and placed SLS in a fictive kin setting. At a preliminary hearing concerning the April 2008 petition, SLS's guardian ad litem (GAL) recommended that respondent have only supervised parenting time, and a circuit court referee adopted this recommendation.

On June 18, 2008, the circuit court held a pretrial hearing. Respondent pleaded no contest to an amended petition and signed another PAA. The GAL then asserted that SLS did "not want to see her mother," and proposed that "any visitation be supervised only at DHS and only if [SLS] consents to the visitation." Respondent's attorney objected, expressing her "hope . . . [that] with family counseling, the visitation, we can repair the relationship." The circuit court rejected the GAL's proposal that SLS possess the authority to control whether parenting time would occur, reasoning that "[a]t 14 years old, she doesn't know everything That's why these adults are in this court." The circuit court emphasized that "[w]e will consider [SLS's] feelings in this particular matter, but what we do is what we think is in her best interest." The circuit court ordered supervised visits of one hour a week.

On September 18, 2008, a referee conducted a dispositional hearing. Foster care worker Bobbi Mitchell recounted that at a supervised parenting time on August 28, 2008, SLS "got very upset" and respondent "was yelling at her, and a supervisor ended the visit based on [SLS] wanting to leave and just the interaction between [SLS] and her mom." According to Mitchell, SLS expressed unwillingness to engage in therapy and declared that she "doesn't want to visit with her mother, and that if she is returned to her mom, she'll just run away." Mitchell suggested that SLS "be allowed to determine if she's going to visit based on how visits have been going." Respondent's attorney urged that supervised parenting times continue and that therapy for SLS start "immediately":

> Hopefully, the child will see that mother is making some progress and making some . . . working with the child. And maybe with the child in therapy, they'll be able to meet on common ground and she may change her mind and may want to have visits. But we need to have an intervening professional here to sit down with these two and . . . get down to the root of what the problems are.

The referee announced, "With regards to the visitation issue, I want to speak with [SLS] alone for a couple minutes, and then I'll come back and give my decision." Immediately before the in camera conversation commenced, respondent attempted to explain what had happened at the August 28, 2008 parenting time:

> *Respondent:* Your Honor?
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> *The Court*: Yes?
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> *Respondent:* Those visits were ordered for one hour, a whole hour.
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> *The Court*: Yes.
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> *Respondent:* Okay. And the judge said that they weren't supposed to be stopped early or anything. And [SLS] was leaving, that's why I was following her.
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> *SLS:* Your Honor?
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> *The Court:* Hold on.

> *Ms. Mitchell:* To address that, a supervisor sent her home because of how escalated the situation got.
>
> *The Court*: All right. Okay. Let me talk to [SLS] for a few minutes. Come on back with me.

No further discussion concerning the August 2008 visit took place on the record. After meeting with SLS in chambers, the referee announced:

> What I'm going to do as far as visitation is concerned, I am going to order supervised visits at the request of [SLS]. I just don't feel that it's in her best interest at this point to force that on her at this point. . . .
>
> . . . But you know, for right now, I really do feel that it's in [SLS's] best interest to just let it gel for awhile.
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> I'm really hesitant . . . I'm hesitant to make a decision with regards to visitation because I know that it was addressed very thoroughly by Judge Viviano. But I feel that the circumstances have escalated at this point and I feel that [SLS]'s just becoming. . . much more agitated and it's, I mean, she's upset. She doesn't want to leave school. . . to go to the visits. They're very traumatic for her. And. . . I think that at this point in time, I think that it's in her best interest to allow her to have a little bit of direction on the visits. So I told her that if she wants to visit and she wants to try it, then I will certainly support that. If she doesn't want to visit right now, I will support that as well. . . .

The referee's written order stated that respondent would have supervised parenting time "*if child requests visits*." (Emphasis in original). Notably, the form order did not include a finding that parenting time "even if supervised, may be harmful to the child," and the referee made no such finding on the record.

At a permanency planning hearing conducted on November 13, 2008, Mitchell disclosed that SLS had commenced individual therapy "in October to address some of the issues she has with her mother," although family therapy had not yet begun. Respondent admitted that she had recently spent a week in a hospital psychiatric unit, and that she had appeared in another court with respect to a probation violation for operating a vehicle while impaired. The referee continued the proceedings for another three months "to see if . . . mom can stabilize herself on her medication," and did not alter the order permitting supervised parenting time only if requested by SLS.

At a continued permanency planning hearing on January 15, 2009, Mitchell reported that SLS was doing well in school and "like[s] her therapist," but noted that respondent and SLS still had not begun family therapy. Respondent acknowledged that she had undergone yet another psychiatric hospitalization. The referee authorized petitioner to file a termination petition and continued supervised parenting times at SLS's discretion.

At a scheduled termination hearing in March 2009, respondent pleaded no contest to the allegations in a permanent custody petition. Mitchell advised that SLS had encountered a

problem at her fictive kin placement that necessitated her relocation to the Federation of Youth Service, a residential facility in Detroit. The GAL informed the referee that SLS was not attending school and "hasn't been able to partake in her therapy, which she's found beneficial." SLS expressed, "I can't stay there. I cannot." Mitchell proposed that a worker from Federation could enter the courtroom, prompting SLS to voice discomfort with the notion of "say[ing] I hate it there in front of their worker." The referee then questioned SLS in chambers. After the proceedings resumed, the referee ordered Mitchell to "work very diligently in getting [SLS] a different placement." Mitchell additionally told the referee that respondent and SLS had not visited since August 2008, and SLS announced, "I'll have a couple visits before the next hearing."[1]

At a best interests hearing on April 3, 2009, the referee permitted respondent's counsel to withdraw her no contest plea. Mitchell reported that SLS remained at the Federation facility, had not been attending school, and was not receiving counseling. SLS suggested, "I think I would be better off just going back to my mother's right now. I'd be in my area, I'd be by my friends, and I'd be safe." The referee rejected this idea: "I don't know what to do, I don't know what to do. I don't think it's safe for you to go home."

The termination hearing occurred on May 29, 2009, June 29, 2009, and September 3, 2009. Petitioner presented clear and convincing evidence establishing several statutory grounds warranting termination of respondent's parental rights. Mitchell painstakingly detailed respondent's longstanding, unabated psychiatric problems and her persistent substance abuse. Respondent offered no testimony on her own behalf and did not even participate on the final hearing date.[2] On appeal, respondent does not challenge the sufficiency of the evidence supporting the statutory grounds for termination invoked by the referee.

On the final hearing date, Mitchell testified that SLS remained at Federation, albeit unhappily. When Mitchell began to describe a plan for SLS to enter a semi-independent living placement, respondent's counsel objected on the ground that comparing placement alternatives with "being placed with the mother" was impermissible. The referee asked the GAL, "Do you plan on putting [SLS] on the stand here today with regards to best interests?" The GAL replied that he did not, and the prosecutor advised, "No, I do not. I don't only because I know that the court has had conversations with [SLS], and you're the trier of fact, and I don't believe that it's necessary to talk to her." At the conclusion of the hearing, the GAL elicited brief testimony by SLS, including the following pertinent portion:

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[1] According to Mitchell, any parenting times would have to occur at the Federation facility. Respondent resided in Roseville and did not have a car. Although the record is not entirely clear, it appears that no parenting times occurred, despite SLS's willingness to engage in them, because of respondent's lack of transportation and petitioner's unwillingness or inability to arrange transportation from Roseville to the Federation facility.

[2] Respondent appeared visibly intoxicated on her arrival at the September 3, 2009 hearing, and she left before an outstanding warrant could be served on her.

Q. Now with regard to whether we terminate your mom's parental rights, what's [sic] your feelings on that?

A. I'd probably be better off with them terminating my mom's parental rights.

Q. Could you say that louder, please? You kind of trailed off there. I know it's difficult, but we have to make a clear record here.

A. I would probably be better off with my mom's parental rights being terminated at this point.

Q. Why do you think that?

A. Because just coming back to court and watching her go up and then down, it's doing no good to me and no good to her to have to keep coming back here.

Respondent's counsel declined to question SLS.

The referee in a bench opinion ruled as follows concerning SLS's best interests:

Now, the hard part comes as far as this opinion. Now, if the court finds that the statutory basis has been satisfied and that the mother has not taken care of the issues that brought the child into care, and if I find that that's been done by clear and convincing evidence, then I may consider the best interest, and may enter an order terminating parental rights if the court feels that it's in the child's best interest to do so.

Now, that's a hard situation, because I have known [SLS] for a very long period of time, and we've had many conversations about this very issue. [SLS] is a very, very mature young lady, even though she's only 15, you would never know it because [SLS] has a good understanding of where she came from and she has a good understanding of her surrounding situation, and she's very articulate. She's very much able to state what her position is, and there have been times when [SLS]'s opinion has gone back and forth, and that's very understandable, because at the time, [SLS] was basing her opinion based on how her mother was doing with her mental health issues and how her mother was doing with her alcohol issues. And there have been times that [SLS] was very hopeful that she would be reunited with her mother and stated that to me. There have also been times when [SLS] has wanted nothing to do with her mother because her mother had failed to provide the stability that she thought she should have.

Now, [the GAL] did have conversation today with [SLS]. *I had some private conversation today with [SLS] as well*.

I do feel that it is in [SLS]'s best interest to enter an order terminating the parental rights of her mother and father, and I thought very long and hard about

this, way before today, because this trial has been going on for many, many months.[3] … *I've decided to enter an order terminating the parental rights of the mother, based on what [SLS] feels is in her best interest, because I think she should have some ownership in this decision as well, and I've asked her what she wanted me to do today.* [Emphasis added.]

II. ANALYSIS

I respectfully disagree with the majority's conclusion that the in camera interviews conducted in this case occasioned harmless error. In my view, the in camera conversations seriously compromised the fairness and integrity of the proceedings and require reversal. Furthermore, I believe that the referee's decision to curtail respondent's parenting time with her child violated several statutory mandates and predetermined the best interests outcome in this case. This error supplies a second ground for reversing the termination of respondent's parental rights.

A. THE IN CAMERA INTERVIEWS

In *In re HRC*, 286 Mich App at 453, this Court held that "there is no authority that permits a trial court presiding over a juvenile matter to conduct in camera interviews, on any subject whatsoever, with the children." The Court summarized the basis for its condemnation of in camera interviews in parental rights termination proceedings:

> Unrecorded, off the record, in chambers interviews of children could potentially unduly influence a court's decision and could affect the court's findings, not just with regard to the child's best interests but also with regard to whether the statutory grounds for termination exist. Not only that, but … such procedures provide no opportunity for cross-examination, impeachment, or meaningful appellate review. The risk of error associated with the use of the in camera interview is plainly unwarranted, especially considering the fact that the testimony elicited through such a procedure can be obtained another way at little cost to the state or the parties involved; for example, through another witness's testimony or by documentary evidence. Thus, it is our view that the use of an unrecorded and off the record in camera interview in the context of a juvenile proceeding, for whatever purpose, constitutes a violation of parents' fundamental due process rights. [*Id*. at 455-456.]

The instant case and *In re HRC* share several important similarities. In both proceedings, the courts "made no statements on the record reflecting the types of questions the children were asked or the evidence that was elicited." *Id*. at 453-454. Here, as in *In re HRC*, "no reviewable record whatsoever" exists documenting the substance of the interviews. *Id*. at 454. The respondents in neither *In re HRC* nor this case objected to the trial court's decision to conduct the in camera interviews. *Id*. at 453. Therefore, as in *In re HRC*, respondent here must

[3] SLS's father never appeared at or participated in any hearings.

demonstrate a plain error that affected her substantial rights. *In re Williams*, 286 Mich App 253, 274; ___ NW2d ___ (2009). This Court should reverse only if "the error seriously affected the fairness, integrity, or public reputation" of the proceedings. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

In *In re HRC*, this Court concluded that the in camera interviews "fundamentally and seriously affected the basic fairness and integrity of the proceedings," and the Court vacated the trial court's best interests decision:

> [A]fter the trial court conducted its in camera interviews of all the children involved, it terminated respondents' rights to all the children. Respondents had no opportunity to learn what testimony was elicited or to counter the information obtained, and no way of knowing how that information may have influenced the court's decision. In addition, the trial court's decision to use in camera interviews resulted in an inadequate record for meaningful judicial review at the appellate level. [*Id*. at 456-457.]

Here, the majority holds that the in camera conversations qualified as harmless. I respectfully disagree with the majority's view that because SLS eventually "testified in open court" about her best interests, the in camera conversation at the dispositional hearing did not deny respondent "fundamental due process." *Ante* at 3. The referee's bench opinion specifically referenced a "private conversation" conducted the same day that the referee decided that SLS's best interests would be served by termination. In the bench opinion, the referee acknowledged her partial reliance on SLS's answers to questions posed in chambers concerning "what she wanted me to do today." Indisputably, the referee utilized fresh information, provided in camera, to determine SLS's best interests. Notwithstanding that SLS testified briefly with respect to her wishes, the information she conveyed in chambers remains unknown.[4] Therefore, I believe that the in camera conversations fundamentally affected the basic fairness and integrity of the proceedings and compel this Court to reverse the referee's finding concerning SLS's best interests.

Furthermore, I believe that a critical fact distinguishing this case from *In re HRC* requires that this Court also reverse the referee's finding that grounds existed for terminating respondent's parental rights. Here, two in camera interviews with SLS occurred *before* the referee rendered a determination that clear and convincing evidence supported statutory grounds for termination of respondent's parental rights. While the trial court in *In re HRC* conducted in camera interviews intending to "generally" use the interviews "to determine the children's best interests," the referee in this case described no such limitation on the in camera conversations she and SLS shared before the referee terminated respondent's parental rights. Accordingly, this Court simply cannot conclude that the evidence supplied in camera played no role in the

[4] The majority correctly notes that respondent's counsel had an opportunity to cross-examine SLS at the termination hearing. However, in the absence of any information about the substance of the in camera discussions SLS had with the referee, respondent's counsel lacked the ability to examine or discredit any evidence that SLS revealed in chambers. In my view, cross-examination conducted in the dark, without knowledge of the witness's direct testimony, fails to satisfy minimal due process standards.

referee's termination decision. Because information supplied by SLS without the benefit of cross-examination, impeachment, or meaningful appellate review may well have tainted the referee's findings in favor of terminating respondent's parental rights, I believe that this violation of respondent's due process rights has poisoned the integrity of the entire proceeding, justifying reversal of the referee's termination decision.

B. PARENTING TIME AND REASONABLE EFFORTS

By maintaining the bonds between parents and children, parenting time plays a critical role in juvenile proceedings. Our Legislature has mandated that in child protective proceedings the court must permit "the juvenile's parent to have frequent parenting time," unless "parenting time, even if supervised, may be harmful" to the child. MCL 712A.13a(11). The court rules echo the liberal parental contact philosophy: "Unless the court suspends parenting time pursuant to MCL 712A.19b(4), or unless the child has a guardian or legal custodian, the court must permit each parent frequent parenting time with a child in placement unless parenting time, even if supervised, may be harmful to the child." MCR 3.965(C)(6)(a). If the court determines that parenting times may harm a child, the court must order "a psychological evaluation or counseling" for the child, and may suspend parenting time pending completion of the counseling or evaluation. MCL 712A.13a(11). Within 30 days of a child's placement outside her home, the petitioning agency must prepare an initial service plan. MCL 712A.13a(8)(a). "[U]nless parenting time, even if supervised," would endanger the child, a case service plan "shall include … a schedule for regular and frequent parenting time between the child and his or her parent, which shall not be less than once every 7 days." MCL 712A.18f(3). The Michigan Children's Foster Care Manual dictates regarding parenting time:

> Parenting time for parent(s) and child(ren) must occur frequently prior to initial disposition and at least weekly thereafter. … Parents should continually be involved in activities and planning for their child(ren), such as attendance at school conferences and involvement in medical and dental appointments, unless documented as harmful to the child.
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> * * *
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> Supervising agencies *must* use parenting time to maintain and strengthen the relationship between parent and child. By facilitating *weekly* parent/child parenting time, agency staff can positively influence the length of time children stay in the foster care system and the time required to achieve permanence. FC workers must engage the family in establishing/scheduling parenting time.
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> Parenting time must be provided for every parent with a legal right to the child, regardless of prior custody. … [*Id.* at 10 (emphasis in original) <http://www.mfia.state.mi.us/olmweb/ex/fom/722-6.pdf> (accessed April 14, 2010).]

"In general, petitioner must make reasonable efforts to rectify conditions, to reunify families, and to avoid termination of parental rights." *In re LE*, 278 Mich App 1, 18; 747 NW2d 883 (2008). Reasonable efforts to reunify families and avoid termination encompass the encouragement and facilitation of regular parent-child contact and visitation. The provision of

parenting time undeniably constitutes an important aspect of every service plan. The importance of parenting time is underscored by this Court's frequent citation to a parent's *failure* to engage in parenting time as a factor weighing strongly against continued parental custody.

In *In re Rood*, 483 Mich 73, 107 (opinion by Corrigan, J.), 123-124 n 2 (concurring opinion by Cavanagh, J.); 763 NW2d 587 (2009), our Supreme Court held that a respondent "may certainly claim procedural error in an action brought by the state to terminate th[e] right [to the care and custody of the child] if the state fails to comply with the required procedures and its failure may be said to have affected the outcome of the case." I believe that the referee's decision to deprive respondent of parenting time with her daughter, absent any specific finding that visitation would harm SLS, affected the outcome of the referee's best interests analysis in this case. The referee's conditioning of parenting time on the whim of a 15-year-old cannot be reconciled with the statutory and court rule requirements for regular and frequent parenting time. If the referee believed that contact with respondent would potentially harm SLS, MCL 712A.13a(11) permitted the referee to suspend visitation and order a psychological evaluation or counseling. But nothing in the record substantiates that the referee ordered a psychological examination or counseling when she opted to invest SLS with the authority to control parenting times.[5] Most significantly, petitioner never made *any* efforts, reasonable or otherwise, to encourage or facilitate parenting time. Instead, Mitchell persistently opposed parenting time, despite the absence of any evidence that supervised contacts with respondent would harm SLS. And in my view, denying or discouraging parenting time is simply incompatible with encouraging and strengthening the parent-child relationship, as contemplated by the applicable statutes and court rules.

In *In re Trejo*, 462 Mich 341, 353; 612 NW2d 407 (2000), the Supreme Court held that even if a respondent offers no best interest evidence after the state has established a ground for termination, MCL 712A.19b(5) "permits the court to find from evidence on the whole record that termination is clearly not in a child's best interests." The Supreme Court emphasized that "the best interest provision of subsection 19b(5) actually provides an opportunity to avoid termination, despite the establishment of one or more grounds for termination." *Id*. at 356. Subsection 19b(5) "affords respondents additional protection by permitting the court to consider evidence, within the whole record, that termination is clearly not in a child's best interests." *Id*. Had respondent received a meaningful opportunity to regularly and frequently visit SLS, respondent may have successfully demonstrated that their bond precluded a finding that termination served SLS's best interests. The referee's order limiting parenting time to the caprice of a troubled teenage girl portended an outcome incompatible with reunification. Petitioner's utter neglect of its responsibility to encourage and facilitate parenting time effectively destroyed any bond that SLS may have had with her mother, further ensuring an outcome unfavorable to respondent with respect to SLS's best interests.

Respondent's psychiatric difficulties, although serious, did not relieve petitioner of its duty to make reasonable efforts to reunite respondent with SLS. I would hold that by effectively

[5] Respondent and SLS underwent psychological evaluations in late March 2009, seven months after SLS opted out of supervised parenting times.

eliminating respondent's parenting time, petitioner and the referee thwarted any opportunity that may have existed for reunification, and that the improper in camera conversations compounded this error. For these reasons, I would reverse.

/s/ Elizabeth L. Gleicher